

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JOSEPH MAKSYMOWSKI,

Defendant-Appellant.

UNPUBLISHED

August 25, 2005

No. 252874

Kent Circuit Court

LC No. 03-002282

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110(a)(2), assault with a dangerous weapon (felonious assault), MCL 750.82, and misdemeanor malicious destruction of property, MCL 750.377a(1)(c)(i). Defendant appeals as of right, challenging only his felonious assault conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

“The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To establish the first element, an assault, the prosecutor must show an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). Defendant argues that the evidence was not sufficient regarding the first and third elements, and that the findings of fact regarding these elements were erroneous. We disagree.

Regarding the element of assault, the trial court did not specifically find that defendant attempted to commit a battery but did find that he committed an unlawful act that placed his ex-wife in reasonable apprehension of an immediate battery. It is undisputed that defendant followed his ex-wife out of her house while carrying her shotgun, and that she did not see the gun. Defendant asserts that any apprehension could not have been reasonable because she did not know he had a gun. However, he had previously threatened her, resulting in the entry of a personal protection order. Moreover, she knew that he had broken into her house and consumed alcohol. She also surmised that he was upset since he had broken a number of her possessions, including a framed picture of her boyfriend. Moreover, she was startled to see him lying on the floor next to her bed when she entered her bedroom, and noted that the shotgun was not in the place she had left it next to the bed. It may have appeared to her that he was hiding or lying in

wait when she entered the bedroom. Thus, although she did not actually see the gun, she inferred, accurately, that she was being pursued with a gun. Circumstantial evidence and reasonable inferences that arise from it can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Under the circumstances, the ex-wife's belief that defendant was carrying a gun was reasonable and gave rise to a reasonable apprehension of an immediate battery. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded that "an unlawful act that place[d] another in reasonable apprehension of an immediate battery," *Grant, supra*, was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Moreover, this finding of fact was not clearly erroneous. See *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Defendant also claims there was insufficient evidence of an intent to injure. However, the third element of felonious assault requires the intent to injure *or* the intent to place the victim in reasonable apprehension of an immediate battery. *Grant, supra*. Regardless of whether his ex-wife was aware of the gun, it can be inferred that defendant intended to scare her into thinking he was going to hurt her with the gun where he chased her through the house while carrying it. Thus, the prosecutor also sufficiently established this element, and the finding was not clearly erroneous.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray